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## When Reporters Break Their Promises to Sources: Towards a Workable Standard in Confidential Source/Breach of Contract Cases

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# When Reporters Break Their Promises to Sources: Towards a Workable Standard in Confidential Source/Breach of Contract Cases

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## I. INTRODUCTION

Journalists rely on confidential source material for a substantial number of news stories.<sup>1</sup> In exchange for a promise of confidentiality,

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1. One study on the relationship between reporters and confidential sources concluded that the average newsperson relies on confidential sources in 22.2% to 34.4% of her stories. See Vincent Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 247 (1971). An updated version of the same survey found that, on average, journalists use confidential source information in 31.25% of their news stories. See John E. Osborn, *The*

confidential sources provide reporters with information that may otherwise be unattainable.<sup>2</sup> The reporter-source relationship furthers the goal of informing the public of political, social and economic developments in the community.<sup>3</sup> This relationship also creates a facilitative scheme, enabling confidential sources to reveal facts they would not disclose otherwise for fear of retaliation.<sup>4</sup> Ordinarily, journalists respect their pledges of confidentiality to sources, feeling morally obliged to do so.<sup>5</sup> Nevertheless, reporters occasionally divulge a source's name either voluntarily or in response to a court order.<sup>6</sup>

When newsmen voluntarily name confidential sources in news articles, disputes inevitably arise between reporters and sources concerning the legal ramifications of promises of confidentiality. Perceiving themselves victimized by a powerful media, aggrieved sources may seek legal redress for the breach of the reporter's "contractual" undertaking not to disclose the source's name.<sup>7</sup> The imposition of liability on a news organization for breach of a contract of confidentiality degrades First Amendment guarantees of a free press because news organizations are, in effect, punished for the publication of truthful information—the core function of an independent, vigorous media.<sup>8</sup> Nevertheless, emerging case law indicates a willingness

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*Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 73 (1985). A more recent study indicates that approximately 52% of national newspaper wire service stories include information obtained from confidential sources. See Jane D. Brown et al., *Invisible Power: Newspaper News Sources and the Limits of Diversity*, 64 JOURNALISM Q. 32, 52 (1987).

2. "A confidentiality agreement consists of a promise by a reporter to a news source that the reporter either will not publish particular information provided by that source or that the reporter will not attribute such information to that source in a published story." Michael Dicke, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1553 n.1 (1989).

3. *Id.* at 1569.

4. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (1977) (dealing with a reporter who had assured confidentiality to his interviewees in order to obtain information about the life of Karen Silkwood as part of an effort to produce a factually accurate film about her life).

5. One study found that 95% of American journalists do not approve of the identification of confidential sources. DAVID H. WEAVER & G. CLEVELAND WILHOIT, *THE AMERICAN JOURNALIST: A PORTRAIT OF U.S. NEWS PEOPLE AND THEIR WORK* 127-28 (1986).

6. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1971) (concerning newsmen forced to appear and testify before state or federal grand juries about the identities of confidential sources allegedly participating in criminal activities).

7. While it is by no means clear that a promise of confidentiality extended by a journalist to a source always creates a binding contract, given the informal nature of the promise and the uncertainty of its terms, this Note assumes that the normal contractual elements are present. Certainly courts must examine all allegations to determine whether a contract existed between the reporter and the source. This Note also assumes that normal agency principles govern the relationship between reporters and their employers, and that the act of granting confidentiality will be imputed to the news organization. See *infra* notes 68-74 and accompanying text.

8. The Supreme Court historically grants more protection to publication as opposed to

among courts to strike the balance in favor of a source's contractual claim.<sup>9</sup> *Cohen v. Cowles*<sup>10</sup> is the first Supreme Court case to address this issue. The majority's holding in *Cohen*, in favor of a breach of contract claim against two newspapers that revealed a source's name, insures that the breach of confidentiality contract scenario will reappear because aggrieved sources are now more readily able to recover damages from media defendants.<sup>11</sup>

#### A. *Facts of Cohen v. Cowles*

Dan Cohen was the director of a public relations firm handling the advertising for the campaign of Wheelock Whitney, the Independent Republican ("IR") gubernatorial candidate in the 1982 Minnesota elections.<sup>12</sup> One week before the election, Gary Flakne, a former IR legislator, uncovered documents which demonstrated that the Democratic-Farmer-Labor candidate for lieutenant governor, Marlene Johnson, had been arrested in 1969 for unlawful assembly (the charge was later dropped) and convicted of petty theft in 1970 (that conviction was vacated a year later).<sup>13</sup> Flakne scheduled a meeting with several IR supporters to discuss the release of these documents to the media.<sup>14</sup> Because of Cohen's ties to the local press, he was chosen as the person who should release the documents under a condition of confidentiality.<sup>15</sup>

Cohen contacted several journalists, including reporters from the *Minneapolis Star and Tribune* ("Tribune") and the *St. Paul Pioneer Press Dispatch* ("Dispatch").<sup>16</sup> Cohen indicated that he was willing to provide documents relating to a candidate in the upcoming election on a confidential basis.<sup>17</sup> The reporters agreed to his terms, and

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news gathering activities of the press because publication "directly implicates the principal roles of the press in the constitutional scheme." Dicke, *supra* note 2, at 1559-60.

9. See, e.g., *Doe v. American Broadcasting Co.*, 16 Media L. Rptr. 1658, 1659 (N.Y. App. Div. 1989) (affirming trial court's denial of defendant news organization's motion for summary judgment in breach of confidentiality contract action).

10. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).

11. "If not reversed, this decision opens the door for an enormous range of real or imagined sources to claim that, in one way or another, they've been victimized by the press." *Two Newspapers Lose Suit For Disclosing a Source*, N.Y. TIMES, July 23, 1988, § 1, at 6 (quoting Floyd Abrams, a First Amendment legal expert).

12. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 252 (Minn. Ct. App. 1989).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Cohen specifically proposed:

I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in

Cohen supplied them with copies of the damaging records.<sup>18</sup>

In investigating the underlying facts of the charges, the reporters learned that the charge against Johnson for unlawful assembly had been dropped and the conviction for petty theft vacated, and a *Tribune* newsperson discovered Gary Flakne's name on the list of persons having recently reviewed the records.<sup>19</sup> The reporter contacted Flakne and asked him for whom he had obtained the documents.<sup>20</sup> Flakne told the reporter that he procured them for Cohen.<sup>21</sup> In light of this new information, the *Tribune's* editors sought to persuade Cohen to release the newspaper from its promise of confidentiality.<sup>22</sup> Cohen refused.<sup>23</sup> The editors debated whether a story merely describing the source as a Whitney supporter or a Whitney campaign member would be satisfactory, but then opted to disclose the entire story.<sup>24</sup> In addition to reporting on Johnson's arrests and conviction, the published story listed Cohen as the source of the documents.<sup>25</sup> It also described his connection to the IR party as a public relations spokesperson for the Whitney campaign.<sup>26</sup> Upon the release of the story, Cohen's employer promptly fired him.<sup>27</sup>

Cohen brought a breach of contract and fraudulent misrepresentation action against the *Tribune* and the *Dispatch*.<sup>28</sup> On the newspapers' motion for summary judgment, the judge ruled that "[t]his is not a case about free speech, rather it is one about contracts and misrepresentation,"<sup>29</sup> thereby eliminating any consideration of First Amendment principles. The jury, finding that both newspapers breached their contracts with Cohen and made material misrepresentations of fact to Cohen, awarded Cohen \$200,000 in compensatory damages and \$500,000 in punitive damages.<sup>30</sup> A divided panel of the appellate court affirmed the trial court's finding of a breach of contract but

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any material in connection with this, and that you will also agree that you're not going to pursue with me a question of who my source is, then I will furnish you with the documents.

*Id.*

18. *Id.*

19. *Id.* at 253.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Cohen v. Cowles Media Co.*, 14 Media L. Rptr. 1460, 1461 (Minn. Dist. Ct. 1987).

29. *Id.* at 1464.

30. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 254 (Minn. Ct. App. 1989).

reversed on the misrepresentation claim.<sup>31</sup> On appeal, the Minnesota Supreme Court affirmed the dismissal of the misrepresentation claim, but reversed on the contract claim, holding that the disclosure of Cohen's name failed to support the breach of contract claim.<sup>32</sup> The court proceeded to consider an alternative ground of promissory estoppel and concluded that the promise of confidentiality received by Cohen was unenforceable under this theory.<sup>33</sup> The court further held that a successful contract claim would violate the newspapers' First Amendment rights.<sup>34</sup>

### B. *Holding of the Supreme Court*

By a five to four vote, the United States Supreme Court recently reversed the Minnesota Supreme Court decision.<sup>35</sup> Although the Court's framing of the issue properly pinpoints the conflict between First Amendment rights and state contract law in the confidential source/breach of contract context,<sup>36</sup> the Court cursorily dismissed the First Amendment concerns raised by this case. Holding that the Minnesota doctrine of promissory estoppel is a law of general applicability because it applies to the daily transactions of all Minnesota citizens, the Court viewed the doctrine's inhibition on the press' function as a "constitutionally insignificant" burden.<sup>37</sup> The Court further diminished the restrictive impact of state enforcement of contract law on truthful publications by emphasizing that "any restrictions which may be placed on the publication of truthful information are self-

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31. *Id.* at 254. In reversing the fraudulent misrepresentation claim, the court eliminated Cohen's recovery of punitive damages. *Id.*

32. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 202, 205 (Minn. 1990).

33. *Id.* at 205.

34. The court found it to be of "critical significance . . . that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." *Id.*

35. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).

36. "The question before us is whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information." *Id.* at 2516.

37. The Court likened this case to a "line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 2518; *see, e.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (news organizations must pay nondiscriminatory taxes); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-79 (1977) (the press may not publish copyrighted materials without obeying the copyright laws); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (the media must comply with the Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1 (1945) (the press may not restrain trade in violation of the antitrust laws); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (the media must obey the National Labor Relations Act).

imposed.”<sup>38</sup> The Court also implied that the *Tribune* and the *Dispatch* acted irresponsibly and with malice in breaching their pledge to Cohen,<sup>39</sup> thereby suggesting that both news organizations deserved punishment.

The majority’s holding produced two dissents. Justice Blackmun criticized the Court’s assumption that a promissory estoppel action imposes only a slight burden on speech. Arguing that the prohibition of the publication of important political speech is the violation conveniently overlooked by the majority, he advocated a higher standard by which to gauge the legality of state enforcement of contract law in this particular setting. Accordingly, “[t]o the extent that truthful speech may ever be sanctioned consistent with the First Amendment, it must be in furtherance of a state interest ‘of the highest order.’”<sup>40</sup> Justice Souter espoused a balancing approach, concluding that the balance here should have been struck in favor of the newspapers because of the paramount public interest in receiving information relevant to political discourse. Souter accused the majority of erroneously applying the reasoning of the general applicability cases to this situation.<sup>41</sup> Souter distinguished between laws of general applicability that address the commercial activities and relationships of the press, and laws that directly affect the newsgathering and publication functions of the press—noting that the latter must be judged in light of constitutional proscriptions.<sup>42</sup> Emphasizing the special role of the media as an institution pertaining to the public, Souter argued that any state action suppressing truthful information relevant to public discourse was presumptively invalid. Since Cohen’s name “expanded the universe of information relevant to the choice faced by Minnesota voters,” Souter concluded that the newspapers chose correctly in deciding to breach their promise to Cohen.<sup>43</sup>

This Note disputes the majority opinion of the Supreme Court in *Cohen* because of its failure to acknowledge the inhibiting effects that the enforcement of Cohen’s contract action has on the reporting of truthful news. Cohen’s name and his ties to the IR party acquired a newsworthy value independent of the Johnson story because this information provided evidence indicating that the IR party intended

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38. *Cohen*, 111 S. Ct. at 2519.

39. “[R]espondents obtained Cohen’s name only by making a promise which they did not honor.” *Id.*

40. *Id.* at 2522 (Blackmun, J., dissenting).

41. *Id.* (Souter, J., dissenting).

42. *Id.*

43. *Id.*

to use dishonorable campaign tactics.<sup>44</sup> This opinion unjustifiably punishes the media despite the Court's belief that compensatory damages are "just another cost of doing business." The result of compensatory damage awards in breach of contract actions is similar to damage awards in libel actions in terms of the palpable chilling effects on the press.<sup>45</sup> By far, the greatest harm posed by this decision is that lower courts facing similar claims will follow the Supreme Court's lead and rule in favor of dissatisfied confidential sources without undertaking any analysis of First Amendment concerns. Even though courts should be concerned with enforcing the principles underlying contract law, in the context of this case, that is just one factor to be weighed against constitutional guarantees of free speech. Courts must not overlook the fact that, when newsworthy information is withheld by enforcing confidentiality promises, public discourse is inevitably diminished.<sup>46</sup>

This Note analyzes the conflict between contract doctrine and First Amendment concerns in the breach of contract of confidentiality setting. Part II provides a brief overview of the historical role of a free press and the function of contract law. This section also presents a summary of the types of sources and their motivations for seeking confidentiality and some of the reasons prompting media defendants to breach promises of confidentiality. Part III examines the evolution of defamation law and cases reconciling reputational interests with the First Amendment. This provides a helpful analogy for courts attempting to harmonize the competing interests at stake in this emerging field. This section also explores statutory and common law developments recognizing a reportorial privilege against compelling journalists to reveal their sources of information. The doctrinal resemblance between these cases and breach of contract of confidentiality issues indicates that a balancing standard is the best means available by which to safeguard the publication activities of the press. Part

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44. The Supreme Court previously acknowledged the newsworthy value of this type of information. "Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation . . . ." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1973).

45. See, e.g., Albert Scardino, *Newspaper in New Case Over Naming Source*, N.Y. TIMES, July 24, 1988, § 1, at 14. A source quoted in a story claimed a reporter had promised her confidentiality. *Id.* Because editors could not determine immediately whether the source had been promised confidentiality, they decided to destroy 600,000 copies of the Sunday magazine supplement awaiting delivery at distribution centers around the state rather than risk a lawsuit. *Id.*

46. "[P]romises of confidentiality by the press are not contracts for the sale of goods or services, but rather, agreements for the suppression of speech." Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 648 (1991).



IV proposes a contextual balancing standard based on several factors unique to confidential source/reporter relationships. This standard is designed to compel courts to consider the First Amendment concerns raised by such claims and to reconcile the constitutional right to a free press with the interest of the states in enforcing private agreements.

## II. EXPLORING THE TENSION BETWEEN FREEDOM OF THE PRESS AND THE RIGHT TO CONTRACT IN REPORTER/CONFIDENTIAL SOURCE RELATIONS

### A. *The Role of a Free Press*

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>47</sup> In addition to First Amendment protection of the right to free speech, which appears to include unfettered expression by media entities,<sup>48</sup> the tradition of an autonomous press is deeply rooted in the social and legal fabric of the United States. Consequently, any state-imposed limitations on the reporting of news automatically trigger constitutional protections. The rationale for this heightened scrutiny of laws inhibiting news reporting is that the communications media serves a paramount role in defending public interests by keeping the citizenry informed. Indeed, "speech via the press is much more significant as a contribution to the democratic dialogue than is speech through nonmedia channels."<sup>49</sup>

The press' function is not limited solely to informing the public.<sup>50</sup> "[T]he press serves as a vehicle and conduit for individual expression."<sup>51</sup> Moreover, the press educates people by "offerring criticism, and providing a forum for debate and discussion."<sup>52</sup> Finally, the primary purpose of a free press is "to create a fourth institution outside the Government as an additional check on the three official

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47. U.S. CONST. amend. I.

48. "The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and comprehends every sort of publication which affords a vehicle of information and opinion." GERALD GUNTHER, CONSTITUTIONAL LAW 1417 (11th ed. 1985) (quoting Chief Justice Burger's concurring opinion in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

49. Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653 (1975).

50. "It is . . . a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a . . . neutral conduit of information between the people and their elected leaders." Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

51. Dicke, *supra* note 2, at 1558.

52. *Id.*

branches.”<sup>53</sup> By carefully scrutinizing elected leaders and their policies, news organizations insure effective self-governance because informed voters select politicians who will promote the voters’ interests. Because the media operates as a quasi-public institution, First Amendment proscriptions against inhibiting truthful news reporting are specifically tailored to safeguard the public’s right to know.<sup>54</sup> News organizations are not unlike fiduciaries of the public in that they are responsible for providing a constant stream of information.<sup>55</sup>

Although the press enjoys a preferred status in the “galaxy of rights conferred by the Constitution,”<sup>56</sup> the press is not immune to the rule of law. The press must obey laws which have negligible effects on the dissemination of speech<sup>57</sup> as well as laws directly regulating expression.<sup>58</sup> In addition, the Supreme Court has steadfastly refused to apply an equal degree of constitutional protection to different classes of speech, thereby creating a hierarchy of informational categories. At the apex of First Amendment freedoms is the discussion of “public affairs and public officials,” which the Supreme Court has described as “the kind of speech the First Amendment was primarily designed to keep within the area of free discussion.”<sup>59</sup> “Fighting words”<sup>60</sup> and “obscenity”<sup>61</sup> are wholly excluded from constitutionally protected free speech while commercial speech, which includes com-

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53. Stewart, *supra* note 50, at 634.

54. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). The Supreme Court stated:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately.

*Id.*

55. See LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 241 (1991). The author further notes that “we do not protect the press for itself, but rather because it serves to guarantee other fundamental values.” *Id.*

56. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

57. See *supra* note 37.

58. Illustrations of laws directly regulating what a news organization may publish include defamation laws as well as laws created to prevent invasion of privacy. See, e.g., *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *New York Times v. Sullivan*, 376 U.S. 254 (1963).

59. *New York Times*, 376 U.S. at 296-97 (Goldberg, J., concurring). “There are very few ‘givens’ in First Amendment jurisprudence, but among them is the proposition that the dissemination of information about government is the core value to be protected under the rubric of ‘freedom of speech, or of the press.’” Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 34 (1988).

60. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

61. See *Roth v. United States*, 354 U.S. 476, 481 (1957).

mercial advertising or speech that merely proposes a commercial transaction, is considered less valuable and therefore entitled to reduced First Amendment protection.<sup>62</sup> Defamatory statements and publications leading to actionable invasion of privacy claims<sup>63</sup> receive significantly greater constitutional protection. A state must have a compelling interest in enforcing laws proscribing the publication of these types of speech, and the regulation must be narrowly tailored to achieve the states' legitimate goals. If the state's interest does not outweigh First Amendment concerns in promoting free expression, a court will not uphold the challenged law.

In light of the Court's approach in granting varying levels of constitutional protection to distinct categories of speech, it would be overly broad to argue that, under all circumstances, confidentiality promises between sources and journalists should take a backseat to First Amendment mandates.<sup>64</sup> First Amendment jurisprudence has never advocated such an absolutist approach.<sup>65</sup> Furthermore, a regime in which the press is free to act as it wishes, without regard to legal constraints imposed on other individuals and institutions, would create a tyrant. Courts must weigh the policies underlying laws that have more than incidental effects on the content of speech against First Amendment principles, in order to strike a balance between the value to our society of an unfettered press with other countervailing but legitimate interests. Thus, courts must examine contracts limiting the media's ability to publish truthful information with this balance in mind.

### B. *Contract Principles*

Contract theory vindicates individual interests, allowing parties to exercise personal autonomy in making enforceable agreements.<sup>66</sup> Through contractual jurisprudence, courts promote societal ends by enforcing socially useful agreements, while refusing to uphold agree-

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62. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 n.24 (1976).

63. These actions involve "true disclosures about the plaintiff's personal life that are embarrassing invasions of privacy, not newsworthy, and subject to liability." GUNTHER, *supra* note 48, at 1062.

64. *But see* Monica Langley & Lee Levine, *Broken Promises*, COLUM. JOURNALISM REV. 21, 24 (July/Aug. 1988).

65. "The Court has never held that there is an absolute privilege to publish all true information, regardless of what other interests are implicated." Levi, *supra* note 46, at 657.

66. Dicke, *supra* note 2, at 1567. "Contract is an aspect of freedom. The ability to contract is one of the features of a free man in a free society." G.H.L. Fridman, *On the Nature of Contract*, 17 VAL. U. L. REV. 627, 636 (1983).

ments that are against public policy.<sup>67</sup> Contract law is perhaps the only legal vehicle for recognizing and upholding the right of individuals to freely exercise their will by enforcing voluntary promises. The principles underlying contract doctrine predate the Constitution and have cognizable social and moral values that operate independently of the formal legal system. Simply put, societal norms consider it unfair for one party to induce another party to make a promise, derive the benefit of that promise and then subsequently breach the concomitant obligation with impunity. Society is concerned when the promisor incurs a detriment while the promisee escapes unscathed and in a better position than he was before the contract. These legal and ethical concerns apply to commercial as well as non-commercial contracts. With non-commercial contracts, however, other competing interests, such as the right to a free press, may caution against a formalistic application of contract law. Breach of contract of confidentiality cases highlight the latter scenario.

When a reporter promises a source confidentiality, the traditional contract elements are present.<sup>68</sup> A source's request for confidentiality constitutes an offer.<sup>69</sup> A reporter's consent to this condition constitutes acceptance.<sup>70</sup> The consideration flowing from the reporter is the reporter's promise of confidentiality, and the consideration flowing from the source is the information imparted to the reporter.<sup>71</sup> Reporter-source relationships are mutually beneficial. Reporters obtain newsworthy information otherwise not available, and sources achieve their aim of disclosing information while protecting their identities. The advantages both parties derive from these relationships explain the increase in the use of confidentiality source material over the past few years.<sup>72</sup>

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67. "[I]n general, parties may contract as they wish," but there are certain instances in which "the interest in freedom of contract is outweighed by some overriding interest of society." RESTATEMENT (SECOND) OF CONTRACTS, ch. 8 (1981). One example of an agreement against social policy is the non-competition covenant in the employment setting. These contracts typically provide that if an employee decides to leave his place of employment, he may not directly compete with his former employer for a certain length of time after his departure or he may not seek similar employment with a competitor within a limited geographic boundary. See DEBORAH A. DEMOTT, FIDUCIARY OBLIGATION, AGENCY AND PARTNERSHIP: DUTIES IN ONGOING BUSINESS RELATIONSHIPS 147-60 (1991). Many jurisdictions are hostile to consensual restraints on competition. *Id.*; see, e.g., Cal. Bus. & Prof. Code § 16600 (West 1987) (statutory provisions make void "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind.").

68. A valid contract consists of an offer, acceptance and consideration. PAUL R. CONWAY, OUTLINE OF THE LAW OF CONTRACTS 42 (3d ed. 1968).

69. Dicke, *supra* note 2, at 1567.

70. *Id.*

71. *Id.*

72. See *supra* note 1 and accompanying text.

An important principle of contract law is that remedies are based on strict liability, without regard to fault.<sup>73</sup> An aggrieved party need only establish the existence of the elements of a contract and that the defendant breached it in order to recover.<sup>74</sup> Thus, any reasons offered by media defendants to justify the breach of a promise to a confidential source are irrelevant under traditional contract doctrine. Similarly, the newsworthy value of the information published as a result of the breach is not a defense to a finding of liability. The confidential source/breach of contract cases clearly do not fit within traditional contract analysis, which does not provide an analytical vehicle for balancing as well as protecting the countervailing First Amendment interests. Therefore, any standard developed to accommodate these competing values must focus on the dynamics of the reporter-source relationship.

### C. *Confidential Sources and Their Relationships with the Press*

Confidential sources are indispensable to the professional journalist's task of "gathering, analyzing, and publishing the news."<sup>75</sup> There are different types of sources primarily distinguished by the reasons motivating them to seek confidentiality. Sources include members of politically unpopular dissident groups who seek to protect their identities for fear of government retaliation.<sup>76</sup> Private individuals also occasionally disclose information concerning governmental or corporate misdeeds on a confidential basis in order to protect their jobs or their personal safety.<sup>77</sup> Currently, the predominant type of confidential source are public officials who "view anonymity as the price the public must pay to learn certain information about its government."<sup>78</sup> A significant percentage of former government officials admit to acting as confidential sources during their tenure, routinely providing the press with information about government affairs.<sup>79</sup> Indeed, confidential relationships in the government setting have

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73. Fridman, *supra* note 66, at 648.

74. Any failure to perform as promised constitutes a breach. H. HUNTER, MODERN LAW OF CONTRACTS—BREACH AND REMEDIES § 2.01 (1986).

75. *Branzburg v. Hayes*, 408 U.S. 665, 711-12 (1971) (Douglas, J., dissenting).

76. *See, e.g., Branzburg*, 408 U.S. at 675 (reporter interviewed several members of the Black Panther party on a confidential basis to secure information about their views).

77. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 435 (10th Cir. 1977) (reporter insured confidentiality to several witnesses he interviewed to obtain information for a project to make a film about the life of Karen Silkwood).

78. Langley & Levine, *supra* note 59, at 44.

79. One study found that 42% of former federal officials in policymaking positions acknowledged that they had provided confidential information to the press while in office. *See* MARTIN LINSKY, IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING 172 (1986).

become so common that journalists and public officials have developed a "code language" by which to determine how information will be published.<sup>80</sup> Reporters encourage this trend because, without confidential source material, "it would be impossible to understand government, especially diplomacy and national security."<sup>81</sup>

Confidential sources who provide journalists with information about the government are referred to metaphorically as "leaks."<sup>82</sup> Some leaks operate clandestinely, while others, who are authorized by a higher authority, are better known as "plants."<sup>83</sup> Government leaks are further subdivided according to their incentives for leaking: the ego leak,<sup>84</sup> the goodwill leak,<sup>85</sup> the policy leak,<sup>86</sup> the animus leak,<sup>87</sup> the trial balloon leak,<sup>88</sup> the whistleblower leak<sup>89</sup> and the record correction leak.<sup>90</sup> This categorization reflects a broad spectrum of leaks and their motivations, with some sources deserving more protection than others. The prototypical whistleblower is admired for his courage in exposing the truth, whereas the anonymous source of "government disinformation campaigns and political smear tactics" is scorned.<sup>91</sup> While some sources legitimately request confidentiality in

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80. "Off-the-record" comments cannot be used in any story. STEPHEN HESS, *THE WASHINGTON REPORTERS* 19 (1981). "Background" remarks can be used to identify the source in a general fashion without naming him. *Id.*

81. POWE, *supra* note 55, at 172. Specifically, "such information is invaluable to reporters for verifying on-the-record statements, providing tips or leads on new stories, persuading editors to give a story more prominence, determining the proper significance or meaning of certain facts and developments, and inducing reticent sources to divulge information by demonstrating to them that they are not the only ones who are talking to reporters." Osborn, *supra* note 1, at 73.

82. "A leak is a covert transaction carried out in strict anonymity at a time when the government itself is not officially opening the tap." Langley & Levine, *supra* note 59, at 29.

83. Plants are defined as "authorized distributions of information to the press for which no particular government agent wishes to take public responsibility." Levi, *supra* note 46, at 628.

84. The ego leak is motivated "to satisfy a sense of self-importance." STEPHEN HESS, *THE GOVERNMENT/PRESS CONNECTION* 77 (1984).

85. The goodwill leak wishes to develop a good relationship with the press as "a play for future favor." *Id.*

86. Policy leakers are making "a straightforward pitch for or against a proposal." *Id.*

87. The animus leak is "used to settle grudges." *Id.* Its purpose is to harm an opponent and undermine his position. *Id.*

88. The trial balloon leak reveals "a proposal that is under consideration in order to assess its assets and liabilities." *Id.*

89. Government whistleblowers comprise "frustrated civil servants who feel they cannot correct a perceived wrong through regular government channels." *Id.* The term has also been applied to private individuals. *See, e.g.,* Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

90. Record correction leaks leak "in order to correct erroneous information circulating in the press." HESS, *supra* note 84, at 77.

91. "[T]he prototypes reflect a commitment to the following ideals: fully-informed, truthful public discourse; open, clean, efficient and accountable government; conformity to law

order to protect their jobs or their lives, in some situations, promises of confidentiality are elicited by clever sources who wish to disguise their intended maneuverings of the press. If the confidential source intends to harm a political adversary and his identity is disclosed, his objectives may backfire as there is an appearance that the source is engaging in sinister techniques for political expediency. Other sources might seek to gauge the popularity of an untested political, social or economic plan without risking being linked to a policy that may prove unpopular later.

Journalists traditionally respect confidentiality agreements with their sources regardless of the source's motives. This practice is partially fueled by a strong ethical drive to honor one's promises at all costs, even if a reporter must face incarceration for refusing to reveal a source.<sup>92</sup> Reporters are also subject to institutional pressures which prevent them from naming sources. If a newsperson routinely breaches confidentiality promises, existing and potential sources will hesitate to distribute information to him, thereby making it more difficult for the reporter to uncover newsworthy items and thus impeding professional advancement.<sup>93</sup> Another viable concern is that, if news organizations cave in to external demands to disclose confidential sources' identities, their autonomy may be compromised for they will appear to have become "investigative arms of government."<sup>94</sup>

Despite the economic and ethical disincentives for the media to disclose the names of sources, editors often decide to violate promises of confidentiality.<sup>95</sup> Editors and reporters, however, exercise this choice discretely, and disclose confidential sources only under certain narrowly defined circumstances. Reporters may disclose a source's identity if the source dies.<sup>96</sup> The discovery that the source has deliberately misrepresented material facts or that the source providing information about a crime turns out to be involved in the crime may also prompt disclosure.<sup>97</sup> The fear of substantial damage awards in

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in industry and government; and a powerful and independent press capable of informing the public and policing the state." Levi, *supra* note 46, at 712 (footnotes omitted).

92. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1971).

93. "Since journalistic careers can at the very least be stalled by a reduction in information flow, it is very risky for reporters to antagonize important government officials." Levi, *supra* note 46, at 682.

94. *Branzburg*, 408 U.S. at 707 n.41.

95. See generally Langley & Levine, *supra* note 64, at 21 (noting the "emerging phenomenon of reporters breaking faith with their sources").

96. Bob Woodward of *The Washington Post* revealed that the now deceased former director of the CIA, William Casey, was one of his sources. *Id.*

97. In 1977, a reporter promised Presidential Press Secretary Jody Powell confidentiality in exchange for damaging information concerning Senator Charles Percy. The reporter checked the information, found it to be absolutely false, and then broke his promise by writing

libel actions also induces disclosure when necessary to avoid liability.<sup>98</sup> In addition, newspapers may perceive a professional obligation to disclose a source when such disclosure is necessary to "set the record straight," as when *Newsweek* indicated Lieutenant Colonel Oliver North was the leak responsible for revealing highly sensitive information related to the Achille Lauro hijacking.<sup>99</sup>

More courts will face breach of contract of confidentiality actions as media defendants continue to disclose their sources, thereby inducing aggrieved sources to seek legal remedies. In order to properly address the competing values at stake in these cases, courts must consider the reasons proffered by the news organization for breaching a pledge of confidentiality, and the source's reasons for requesting anonymity. An exploration of the jurisprudential history of other areas of law directly affecting freedom of the press will provide courts with a greater sensitivity of the policy concerns in this emerging field.

### III. PERSPECTIVES PROVIDED BY OTHER AREAS OF LAW WHERE THE RIGHT TO A FREE PRESS MUST BE BALANCED AGAINST COUNTERVAILING INTERESTS

#### A. *The Development of Defamation: From Strict Liability to a Balancing Approach*

The evolution of defamation law provides a useful analogy to guide courts in the resolution of breach of contract of confidentiality issues. In attempting to harmonize the conflict between reputational interests and First Amendment principles, *New York Times v. Sullivan*<sup>100</sup> and its progeny present a scheme that favors equilibrium over absolutism.<sup>101</sup> While the interests competing with free speech values in defamation cases are distinguishable from the competing interests in

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a story about how Powell had passed along erroneous information to smear Senator Percy. Richard D. Smyser, *There are Sources and Then There are "Sourcerers,"* 5 SOC. RESP. JOURNALISM L. MED. 13, 17-18 (1979).

98. Langley & Levine, *supra* note 64, at 22.

99. Oliver North and CIA Director William Casey discussed secret operations with the media once they were guaranteed anonymity. During the Iran-contra hearings, North testified that "leaks" had led to the publication of information about the interception of an Egyptian plane carrying the suspected hijackers of the Achille Lauro. North added that he believed the "leaks 'very seriously compromised our intelligence activities.'" Shortly thereafter, *Newsweek* revealed that it had obtained details about the interception from North himself. *Id.*

100. 376 U.S. 254 (1964).

101. Absolutism in defamation means either that the weight of the constitutional guarantee or that the right to protect one's reputation from the publication of malicious falsehoods will always frustrate the other. As the Court recognized in *New York Times*, "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards satisfying the First Amendment." *Id.* at 269.



confidential source cases, the policies underlying defamation jurisprudence demonstrate that a balancing of competing interests is necessary to prevent the inhibition of speech that unavoidably follows the formalistic application of contract law.

At common law, defamation was a strict liability tort.<sup>102</sup> All a plaintiff needed to prove in order to prevail was that the defendant had published a statement tending to injure the plaintiff's reputation.<sup>103</sup> Since actual injury was not an element of the action, proof of the defamatory publication gave rise to a "galloping" presumption of damages.<sup>104</sup> The defenses available to the defendant included truth,<sup>105</sup> privilege,<sup>106</sup> or fair comment and criticism,<sup>107</sup> but these defenses were so narrowly circumscribed as to provide the publisher with no shield. Because defamation plaintiffs were not required to show intent, recklessness or even negligence by the defendant, news organizations were often left in the unenviable position of being financially liable whenever an inadvertent falsehood was printed.<sup>108</sup> Publishers fearful of litigation costs and libelous damages would monitor all news items, censoring any information thought to be remotely defamatory.<sup>109</sup> The obvious chilling effects on the press of early defamation law remained unchecked until the Supreme Court wiped the slate clean with its decision in *New York Times v. Sullivan*.<sup>110</sup>

## 1. THE SUPREME COURT CASES

In *New York Times v. Sullivan*, L.B. Sullivan, the police commissioner of Montgomery, Alabama, alleged that he had been libeled in a

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102. An individual incurred liability by publishing written or spoken material with a tendency "so to harm the reputation of another as to lower him in the estimation of the community." RESTATEMENT (SECOND) OF TORTS § 559 (1938). One who published false and defamatory material was strictly liable for damages, even without proof of actual harm. *Id.*

103. *Id.*

104. Kurt Hirsch, *Throwing the Book at Revelations: First Amendment Implications of Enforcing Reporters' Promises*, 18 REV. L. & SOCIAL CHANGE 161, 165 (1991).

105. Truth was a valid defense, because where the defamatory statement was true, the plaintiff's reputation would have been justifiably damaged. RESTATEMENT (SECOND) OF TORTS § 581A (1938).

106. Some states allowed a defense of privilege whereby the defendant could escape liability because the defamation was communicated in furtherance of some important social interest. In general, the immunity was only available with regard to statements made during government proceedings or communications between husbands and wives. Hirsch, *supra* note 104, at 165.

107. Fair comment and criticism protected expression of defamatory criticism and opinion on matters of public concern based on facts established as true. RESTATEMENT (SECOND) OF TORTS § 606 comment b (1938).

108. Hirsch, *supra* note 104, at 165.

109. *Id.*

110. 376 U.S. 254 (1963).

*New York Times* advertisement paid for by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."<sup>111</sup> The advertisement, which never mentioned Sullivan's name, described certain incidents of racial confrontation between the police and African-American leaders in Montgomery.<sup>112</sup> Sullivan proved that despite his non-involvement in any of the episodes depicted in the report, certain Montgomery residents had read some of the ad's statements as referring to him by virtue of his position as the public official in charge of police affairs.<sup>113</sup> Although Sullivan did not show that he suffered actual pecuniary loss as a result of the alleged libel, the jury awarded him \$500,000 in damages.<sup>114</sup>

On appeal, the Supreme Court reversed, holding that First Amendment constraints mandated that public officials<sup>115</sup> like Sullivan could not recover any damages for a defamatory falsehood unless they proved that the statement was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>116</sup> Citing a strong national commitment to "uninhibited, robust, and wide-open" debate on public issues, the Court recognized the inevitability of erroneous statements as a necessary cost of free speech that outweighed the state's interest in providing redress to individuals with injured reputations.<sup>117</sup> The Court rejected the faultless standard of the common law because it resulted in media defendants often censoring important information in order to avoid the threat of litigation costs and libel damages.<sup>118</sup> The Court's material departure from the common law approach to defamation thus gave news organizations more breathing space within which to rigorously pursue and report news concerning public officials.

Subsequently, the Court applied the *New York Times* rationale to

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111. *Id.* at 256-57.

112. *Id.* at 257-58. Although there were some minor factual inaccuracies in the advertisement, Sullivan's claim was premised on the assertion that the incidents imputed to him depicted him as the instigator of racist harassment. *Id.*

113. *Id.* at 258.

114. *Id.* at 256.

115. The term "public official" applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

116. *New York Times*, 376 U.S. at 279-80.

117. "Whatever is added to the field of libel is taken from the field of free debate." *Id.* at 270 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942)).

118. "[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

expand the actual malice standard to include unelected public figures. In *Curtis Publishing Co. v. Butts*,<sup>119</sup> a university football coach sued the *Saturday Evening Post* for an article it published that accused the coach of conspiring to "fix" a football game.<sup>120</sup> The Court defined public figures to encompass those who "commanded a substantial amount of independent public interest at the time of the publications."<sup>121</sup> The Court held that public figures, like elected officials, would be required to prove the more burdensome actual malice standard in order to recover in a libel action because public figures purposefully "thrust[ ] . . . [themselves] into the vortex of an important controversy."<sup>122</sup>

*Rosenbloom v. Metromedia*<sup>123</sup> was the first Supreme Court case dealing with a defamation action brought by a private individual. This decision represents the pinnacle in terms of the protections afforded media defendants against libel claims. The Court repudiated its prior emphasis on the public or private status of the individual bringing the claim as the methodology by which to ascertain ultimate recovery.<sup>124</sup> Instead, the Court focused on whether the substance of the allegedly defamatory utterance related to issues of public or general concern in order to decide whether the actual malice standard applied.

George Rosenbloom was a distributor of nudist magazines who was arrested twice within three days for selling allegedly obscene materials.<sup>125</sup> Following the arrests, the defendant's radio station broadcast stories referring to the magazines distributed by Rosenbloom as "obscene" and labeling him a "girlie-book peddler[ ]" running a "smut literature racket."<sup>126</sup> Rosenbloom was subsequently acquitted of the criminal charges when it was adjudged, that as a matter of law, the distributed magazines were not obscene.<sup>127</sup> He then brought a defamation action against the radio station.<sup>128</sup>

The Supreme Court held that, although Rosenbloom was a private individual who had not voluntarily sought publicity, he could not prevail because he failed to establish actual malice by the radio sta-

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119. 388 U.S. 130 (1967).

120. *Id.* at 135.

121. *Id.* at 154.

122. *Id.* at 155.

123. 403 U.S. 29 (1970).

124. "Drawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees." *Id.* at 45-46.

125. *Id.* at 32-33.

126. *Id.* at 34-35.

127. *Id.* at 36.

128. *Id.*

tion.<sup>129</sup> The Court reasoned that the police campaign to enforce the obscenity laws involved an issue of public interest and that an analysis focusing on Rosenbloom's status as either a public personality or private individual was misplaced and insufficient to meet First Amendment guarantees.<sup>130</sup> The new public interest standard articulated by the *Rosenbloom* majority greatly expanded the range of protection accorded media defendants because private individuals engaging in activities of public interest would now be required to demonstrate actual malice by the defendant in order to recover. In addition, public figures would still be held to an actual malice standard since their activities always fell within the purview of public interest.

A few years later, the Court retreated slightly from the expansiveness of *Rosenbloom* in *Gertz v. Robert Welch, Inc.*<sup>131</sup> The case involved Elmer Gertz, an attorney retained by the family of a young man killed by a policeman to represent them in a civil action against the officer.<sup>132</sup> *American Opinion* magazine published an article concerning the policeman's trial for murder, contending that testimony against the officer had been falsified and that the prosecution was participating in a Communist conspiracy against the police.<sup>133</sup> The report inaccurately named Gertz as a co-conspirator in the alleged plot and labeled him a "Leninist" and a "Communist-fronter."<sup>134</sup> Gertz filed a libel action against the magazine.<sup>135</sup> Applying the *Rosenbloom* public interest standard, the trial court held that, even though Gertz was a private individual, he could not recover unless he established actual malice by the defendant because the article involved a matter of public interest.<sup>136</sup>

On appeal, the Supreme Court reversed by reintroducing the public versus private individual distinction first advanced in *New York Times*. The Court reasoned that Gertz, as a private person, "relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."<sup>137</sup> The Court indicated that "so long as they do not impose liability without fault,

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129. *Id.* at 52.

130. "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Id.* at 43.

131. 418 U.S. 323 (1973).

132. *Id.* at 325.

133. *Id.* at 326.

134. *Id.*

135. *Id.* at 327.

136. *Id.* at 329-30.

137. *Id.* at 345.

the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."<sup>138</sup> Thus, Gertz, as a private individual, merely needed to show that the defendant had failed to exercise reasonable care in checking the veracity of the story it published. The Court also curtailed the possibility that private individuals could recover exorbitant libel damages by holding that, unless actual malice was shown, plaintiffs would be entitled only to compensatory damages for actual injury.<sup>139</sup>

To date, *New York Times v. Sullivan* and its progeny adhere to a standard requiring public officials or figures to prove actual malice by the media defendant before they may receive compensation. Private individuals need not meet the strictures of actual malice in order to recover, but if the plaintiff establishes mere negligence by the media entity, damages will be limited to those actually sustained. Furthermore, the Supreme Court has expressly held that no state may impose a strict liability standard in libel actions, thereby precluding any return to pre-*New York Times v. Sullivan* defamation jurisprudence.

## 2. THE LESSON OF DEFAMATION

A review of the development of defamation jurisprudence demonstrates that courts gradually realized that all libel actions place First Amendment principles at odds with the interests of states in protecting an individual's reputation. The common law faultless defamation standard crippled good faith efforts by the press to vigorously pursue and publish news for fear of being subjected to substantial litigation expenses and libel damages. The First Amendment was specifically designed to guard against such chilling effects on truthful news reporting. Yet courts could not categorically strike down all defamation actions on the basis of First Amendment interests because "absolute protection for the communication media requires a total sacrifice of the competing value served by the law of defamation."<sup>140</sup> Obviously the greater protection accorded media entities since *New York Times v. Sullivan* has not been without cost. The actual malice test approximates a showing of intent and is difficult to prove; therefore, some falsehoods will inevitably be published for which no recovery is possible.<sup>141</sup> Acknowledging the imperfections in reconciling defama-

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138. *Id.* at 347.

139. *Id.* at 349.

140. *Id.* at 341.

141. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of

tion law with the First Amendment, the Supreme Court has noted that such a cost "is a necessary evil associated with promoting the free and robust exchange of ideas envisioned under the First Amendment."<sup>142</sup>

Although some commentators advocate importing defamation standards directly to the breach of contract of confidentiality cases,<sup>143</sup> this Note suggests that the lesson to be derived from the development of defamation jurisprudence is that courts must balance competing interests which restrain truthful news reporting against First Amendment values. When promises to uphold confidentiality inhibit the truthful reporting of newsworthy items, such as Cohen's identity and his connection to the IR party, First Amendment values are directly implicated. As in the defamation context, granting the press greater protections in these contract cases will undoubtedly entail certain costs. In certain cases, sources who legitimately expect media defendants to maintain promises of confidentiality will be precluded from recovering damages because they will be unable to prove the existence of a contract or because the newsworthy value in the disclosure of their names overshadows the interest in enforcing the promise. If defamation cases recognize that there are necessary costs in order to promote a free press, the same principle must be true of the breach of contract of confidentiality cases.

There remains another unexplored link between the defamation and breach of contract of confidentiality actions as illustrated by the *Cohen* case. Cohen's complaints resemble those typically alleged in defamation suits. His injuries were characterized as "a kick in the face," "embarrassing," and "humiliating," and Cohen's counsel asked the jury to "restore . . . [Cohen's] good name."<sup>144</sup> "Casting Cohen's claim as a contract action may have been a strategic decision aimed at avoiding the burdensome constitutional requirements imposed upon plaintiffs asserting tort claims against media defendants."<sup>145</sup> In such cases, courts must become alert to the attempt to seek redress for

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defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.

*Id.* at 342.

142. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

143. See, e.g., Dicke, *supra* note 2, at 1579-85; Hirsch, *supra* note 104, at 202-05.

144. Hirsch, *supra* note 104, at 180 (quoting Brief of Appellant Cowles Media Co. at 10, *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990) (No. C8-88-2631)).

145. *Id.* "The most powerful people in society would leap to the chance to sue reporters if they did not have to prove falsity and defamation." *New Yorker in the Fray on Journalism and Ethics*, N.Y. TIMES, March 21, 1989, § 1, at 7, col. 1.

defamations through the "backdoor" of contract actions and directly impose First Amendment principles.

### B. *The Reportorial Privilege: A Further Balancing Scheme*

Common law or statutory reportorial privileges give journalists either an absolute or qualified right to refuse to reveal the identities of their sources in response to judicial, legislative or administratively issued subpoenas. Media defendants typically assert reportorial privileges in grand jury,<sup>146</sup> criminal<sup>147</sup> or defamation<sup>148</sup> proceedings. Although a lack of uniformity exists among jurisdictions as to the scope of the protection,<sup>149</sup> the ostensible purpose for this privilege is to secure the news gathering function of the press.<sup>150</sup> Therefore, the privilege pertains exclusively to news organizations and not sources.<sup>151</sup> The development of reportorial privilege jurisprudence informs the breach of contract of confidentiality debate because case law and legislative enactments have formulated tests to balance the need for a free press with the public's right to exact the truth in judicial proceedings. These balancing tests show that judicially manageable standards are both possible and essential to the proper resolution of breach of contract of confidentiality cases.

#### 1. *BRANZBURG V. HAYES AND ITS AFTERMATH*

*Branzburg v. Hayes* is the only Supreme Court case to address the issue of whether journalists have a First Amendment right to refuse to appear and testify before state or federal grand juries.<sup>152</sup> The opinion consists of four consolidated cases involving journalists who declined to disclose the names of their confidential sources to grand juries. Two of the consolidated cases, *Branzburg v. POUND*<sup>153</sup> and *Branzburg v. Meigs*,<sup>154</sup> involved stories prepared by Paul Branzburg, a staff reporter for the *Courier-Journal*, a daily newspaper published in

146. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972).

147. See, e.g., *In re Farber*, 394 A.2d 330 (N.J.), cert. denied, 99 S. Ct. 598 (1978).

148. See, e.g., *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

149. See generally Sharon K. Malheiro, *The Journalist's Reportorial Privilege—What Does it Protect and What are its Limits?*, 38 DRAKE L. REV. 79 (1988-89) (discussing various statutory and common law treatments of the reportorial privilege).

150. "The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." *Branzburg*, 408 U.S. at 681.

151. "[T]he privilege claimed is that of the reporter, not the informant." *Id.* at 695.

152. *Id.* at 667.

153. 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

154. 503 S.W.2d 748 (Ky. 1971), *aff'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Louisville, Kentucky.<sup>155</sup> On one occasion, Branzburg was allowed to observe residents of Jefferson County synthesizing hashish from marijuana after he promised to maintain their confidentiality.<sup>156</sup> In the second case, Branzburg wrote a separate article based on information provided by confidential sources detailing the use of drugs in Frankfort, Kentucky.<sup>157</sup> He interviewed numerous drug users and witnessed some of them smoking marijuana.<sup>158</sup> After the articles were published, two grand juries subpoenaed Branzburg.<sup>159</sup> Refusing to disclose his sources, Branzburg sought to quash the subpoenas on the grounds that revealing the names of his sources would "destroy the relationship of trust which he presently enjoys with those in the drug culture" and would hamper the media's ability to "cover the views and activities of those involved in the drug culture."<sup>160</sup> Although the motion to quash was denied, the trial court issued a protective order that protected Branzburg from revealing "confidential associations, sources or information" but that required him to "answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him]."<sup>161</sup>

*In re Pappas*,<sup>162</sup> the third consolidated case, involved a newsman-photographer who reported on civil disorders in New Bedford, Massachusetts in July, 1970. Pappas was permitted to enter the Black Panther headquarters after he agreed not to disclose anything he witnessed or heard inside except for an anticipated police raid.<sup>163</sup> Because the raid failed to occur, Pappas never wrote a story covering the event.<sup>164</sup> A few months later, however, he was summoned before a grand jury.<sup>165</sup> Pappas declined to answer questions about what had transpired inside the Panther's headquarters.<sup>166</sup> The trial court denied his motion to quash the subpoena on First Amendment grounds.<sup>167</sup> On appeal, the Supreme Judicial Court of Massachusetts took "judicial notice that in July, 1970, there were serious civil disorders in New Bedford, which involved street barricades, exclusion of

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155. *Branzburg*, 408 U.S. at 667.

156. *Id.* at 667-68.

157. *Id.* at 669.

158. *Id.*

159. *Id.*

160. *Id.* at 669 n.5.

161. *Id.* at 670.

162. 266 N.E.2d 297 (Mass. 1971), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

163. *Branzburg*, 408 U.S. at 672.

164. *Id.*

165. *Id.*

166. *Id.* at 672-73.

167. *Id.* at 673.



the public from certain streets, fires, and similar turmoil.”<sup>168</sup> The court held that the grand jury investigation was appropriate and that Pappas did not have either a qualified or absolute right to resist testifying.<sup>169</sup> The court deemed that any adverse impact on the news gathering activities of the press was “indirect, theoretical, and uncertain.”<sup>170</sup>

The final consolidated case, *Caldwell v. United States*,<sup>171</sup> arose from subpoenas issued by a federal grand jury to Earl Caldwell, a reporter for the *New York Times*, assigned to cover the Black Panther Party and other militant groups.<sup>172</sup> He was ordered to appear and testify and to produce notes and tape recordings of interviews with Black Panther officials “concerning the aims, purposes, and activities of that organization.”<sup>173</sup> He moved to quash the subpoena on the grounds that his appearance “before the grand jury would destroy his working relationship with the Black Panther Party and ‘suppress vital First Amendment freedoms by driving a wedge of distrust and silence between the news media and the militants.’”<sup>174</sup> The government argued that the grand jury was investigating possible violations of a number of criminal statutes prohibiting threats against the President,<sup>175</sup> attempted assassination and conspiracy to assassinate the President,<sup>176</sup> civil disorders,<sup>177</sup> interstate travel to incite a riot,<sup>178</sup> and mail fraud.<sup>179</sup> The district court denied the motion to quash but issued an order protecting Caldwell from having to disclose “confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public.”<sup>180</sup> When Caldwell continued to refuse to appear before the grand jury, he was held in contempt.<sup>181</sup>

The Ninth Circuit noted that “it is not the scope of the interroga-

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168. *Id.* at 673-74.

169. *Id.* at 674.

170. *Id.*

171. 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

172. *Branzburg*, 408 U.S. at 675.

173. *Id.*

174. *Id.* at 676.

175. 18 U.S.C. § 871 (1982).

176. 18 U.S.C. § 1751 (1982).

177. 18 U.S.C. § 231 (1982).

178. 18 U.S.C. § 2101 (1982 & Supp. IV 1986).

179. 18 U.S.C. § 1341 (1982).

180. *In re Caldwell*, 311 F. Supp. 358, 362 (N.D. Cal.), *rev'd sub nom.* *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

181. *Branzburg*, 408 U.S. at 678.

tion to which he must submit that is here at issue, it is whether he need attend at all."<sup>182</sup> The appellate court reversed, concluding that the press enjoys a constitutional privilege to refuse to appear before a grand jury investigating dissenting groups, lest the "public's First Amendment right to be informed . . . be jeopardized."<sup>183</sup> The basis of the court's holding was that "[t]he need for an untrammelled press takes on special urgency in times of widespread protest and dissent."<sup>184</sup>

The Supreme Court, reviewing all four cases, overturned the Ninth Circuit's holding in *Caldwell* and affirmed the holdings of the federal district and state courts in the remaining three cases.<sup>185</sup> The Court held that reporters do not have a constitutional privilege to refuse to appear or testify before a federal or state grand jury.<sup>186</sup> The Court recognized that the First Amendment protected the media's news gathering role<sup>187</sup> but that this protection was narrower in scope than the protection bestowed on the press' publication function.<sup>188</sup> Adhering to the longstanding principle that "the public . . . has a right to every man's evidence,"<sup>189</sup> the Court held that a grand jury's investigative authority is "necessarily broad" if its duty is to be adequately discharged.<sup>190</sup> Therefore, the state's compelling interest in "extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property,"<sup>191</sup> outweighed any dubious curtailment of the media's ability to gather the news. The Court openly doubted the reporters' contentions that, unless a constitutional right to refuse to appear or testify before a grand jury was upheld, sources would be deterred from providing newsworthy information.<sup>192</sup> The Court emphasized

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182. *Caldwell*, 434 F.2d at 1081.

183. *Id.* at 1089.

184. *Id.* at 1084.

185. *Branzburg*, 408 U.S. at 708-09.

186. *Id.* at 702.

187. The dissent emphasized the importance of this protection. "A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated." *Id.* at 727 (Stewart, J., dissenting).

188. "This conclusion . . . involves no restraint on what newspapers may publish . . ." *Id.* at 691.

189. *Id.* at 688 (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961)).

190. *Id.* at 700.

191. *Id.* at 701.

192. "But we remain unclear how often and to what extent informers are actually deterred

that even if empirical evidence supported the reporters' argument, an impediment to the news gathering ability could not justify according constitutional protections to confidential sources engaging in criminal conduct.<sup>193</sup>

In a brief concurring opinion, Justice Powell clarified that media defendants do retain constitutional rights in the grand jury setting.<sup>194</sup> He cautioned that, in all cases where a journalist is called upon to testify before a grand jury, the right to a free press must be balanced against the "obligation of all citizens to give relevant testimony with respect to criminal conduct."<sup>195</sup>

Justice Stewart's dissenting opinion criticized the majority's shortsighted approach to the reportorial privilege issue. Raising the specter of non-criminal confidential sources refusing to approach newsmen for fear of disclosure in a judicial proceeding, he believed that the Court's holding would ultimately harm the grand jury's investigative function.<sup>196</sup> He delineated a three part test to reconcile a state's interest in conducting unimpeded grand jury investigations with First Amendment principles. Under the Stewart test:

[T]he government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>197</sup>

In the wake of *Branzburg*, despite the Court's rejection of a constitutional right to refuse to name a source, state courts and legislators

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from furnishing information when newsmen are forced to testify before a grand jury." *Id.* at 693.

193. "The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection." *Id.* at 691.

194. "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id.* at 709 (Powell, J., concurring).

195. *Id.* at 710.

196. Recognizing that inhibiting the free flow of information would hinder rather than help law enforcement, Justice Stewart stated:

The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import.

*Id.* at 746 (Stewart, J., dissenting).

197. *Id.* at 743 (footnotes omitted).

have adopted the Stewart Standard—thereby recognizing the significance of reportorial privileges as an instrument of a free press.

## 2. AN OVERVIEW OF STATE SHIELD LAWS AND COMMON LAW REPORTORIAL PRIVILEGES

Over half of the states have enacted state shield laws to protect journalists.<sup>198</sup> Most are patterned after the three-part test articulated by Stewart and were drafted in response to *Branzburg*, although some were enacted before *Branzburg*.<sup>199</sup> Although the cloak of statutory protections differ both in construction and judicial interpretation, state shield laws have “raised the level of consciousness among judges and added an aura of legitimacy to the media’s privilege arguments.”<sup>200</sup> Courts interpreting statutory reportorial privileges have held that if the reporter willingly names her source, she waives the privilege.<sup>201</sup> In addition, the nature of the controversy generally determines the scope of the state shield law. In defamation actions, because the plaintiff has no competing constitutional interests at stake, some courts interpret statutory reportorial privileges as granting an absolute protection against compelled disclosure.<sup>202</sup> In criminal contexts, however, the defendant’s constitutional right to a fair trial qualifies the media’s immunity.<sup>203</sup>

States without shield laws adopt a common law reportorial privilege that may provide journalists greater protection from subpoenas

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198. ALA. CODE § 12-21-142 (1986); ALASKA STAT. § 09.25.150 (1991); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1982); ARK. CODE ANN. § 16-85-510 (Michie 1988); CAL. EVID. CODE § 1070 (Deering 1986); COLO. REV. STAT. § 13-90-119 (1990); DEL. CODE ANN. tit., 10 §§ 4320-4326 (1975); GA. CODE ANN. § 24-9-30 (Michie 1990); ILL. ANN. STAT. ch. 110, para. 8-901-909 (Smith-Hurd 1983); IND. CODE § 34-3-5-1 (1983); KY. REV. STAT. ANN. § 421.100 (Michie/Bobbs-Merrill 1991); LA. REV. STAT. ANN. §§ 45:1451-45:1454 (West Supp. 1892); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1989); MICH. COMP. LAWS ANN. § 767.5a (West 1982); MINN. STAT. ANN. §§ 595.021-.025 (West 1988); MONT. CODE ANN. §§ 26-1-901 to -903 (1991); NEB. REV. STAT. §§ 20-144 to -147 (1988); NEV. REV. STAT. § 49.275 (1986); N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1991); N.M. STAT. ANN. § 38-6-7 (Michie 1987); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1991); N.D. CENT. CODE § 31-01-06.2 (1991); OHIO REV. CODE ANN. § 2739.12 (Anderson 1981); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44:510-44:540 (1991); PA. CONS. STAT. tit. 28, § 330 (1979); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (Supp. 1986); TENN. CODE ANN. § 24-1-208 (1980).

199. See, e.g., MARYLAND CTS. & JUD. PROC. CODE ANN. § 9-112 (1989) (statute enacted in 1896).

200. Osborn, *supra* note 1, at 69.

201. See, e.g., *Tofani v. Maryland*, 465 A.2d 413, 417 (1983) (stating that “where the reporter acts in a manner that is inconsistent with the statutory privilege or the intention to rely on it,” she will be deemed to have waived it).

202. See, e.g., *Maressa v. New Jersey Monthly*, 445 A.2d 376 (N.J.), *cert. denied*, 459 U.S. 907 (1982).

203. See, e.g., *In re Farber*, 394 A.2d 330, 337-38 (N.J.), *cert. denied*, 439 U.S. 997 (1978).

requesting disclosure of sources. Courts faced with reportorial privilege issues undertake a balancing analysis which considers "the type of proceeding, the specific information sought, and whether or not the media participate in the controversy."<sup>204</sup> Similar to states that have enacted shield laws following *Branzburg*, many common law reportorial privilege jurisdictions have developed standards comparable to the Stewart three-prong test.<sup>205</sup> Although these tests are applied in both civil and criminal cases, the relative weight given to each factor varies in accordance with the type of case. In criminal cases, "scales should tip heavily in favor of the defendant's right to a fair trial;" however, in civil actions, "absent a showing of significant need by the requesting party, the scales should weigh in favor of the media."<sup>206</sup>

In summary, statutory and common law developments in favor of recognizing reportorial privileges indicate that the *Branzburg* majority opinion is largely discredited. A partial explanation is that *Branzburg* was decided in the context of the political and social turmoil of the late 1960s and early 1970s when the Court was reluctant to grant protection to journalists whose sources included members of anti-establishment groups purportedly engaged in illegal activities. In contrast, today's confidential sources are often government officials, and courts and legislatures, therefore, are more willing to adopt pro-media standards that give journalists a broader news gathering right.<sup>207</sup>

### 3. THE APPLICATION OF REPORTORIAL PRIVILEGE JURISPRUDENCE TO THE CONFIDENTIAL SOURCE/BREACH OF CONTRACT CONTROVERSY

Reportorial privilege issues mirror many of the significant concerns arising in confidential source/breach of contract controversies. In the reportorial privilege context, if a newsperson's right to refuse to disclose a source's identity is consistently outweighed by the state's need to insure a broad investigative function for the grand jury, this subjugates press freedoms to the government's interest. Prospective sources would hesitate to speak to reporters for fear of disclosure,

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204. Malheiro, *supra* note 149, at 93.

205. See, e.g., *Winegard v. Oxberger*, 258 N.W.2d 847, 852 (Iowa 1977) (setting forth the following test a requesting party must satisfy before a journalist is required to disclose information: "(1) That the information is necessary or critical to the involved cause of action or defense pled; (2) That other reasonable means available by which to obtain the information sought have been exhausted; and (3) That it does not appear from the record the action or defense is patently frivolous."). *Id.* (citations omitted).

206. Malheiro, *supra* note 149, at 96.

207. See generally Janet Stidman Eveleth, *Freedom or Confidentiality: Where Do You Draw the Line?*, 21 Md. B.J. 13 (1988) (stating that Maryland is at the forefront in insuring the free flow of public information).

thereby limiting the dissemination of newsworthy information. Similarly, in breach of contract of confidentiality cases, if news organizations must abide by all of their confidentiality agreements, this subjugates the press to the state's interest in enforcing valid contracts. Media defendants either will conceal the source's name and thus publish stories that may contain skewed facts, or they will opt not to publish anything. Both results reduce the pool of truthful information available to the public. The ultimate censorial effect in both the reportorial privilege and breach of contract of confidentiality settings is parallel. The two governmental interests will hold the press hostage in direct contravention of First Amendment rights. Courts deciding breach of contract of confidentiality cases should therefore learn from the post-*Branzburg* development of reportorial privilege jurisprudence and adopt a contextual standard that balances the competing values of upholding valid contracts against First Amendment guarantees. Indeed, the fact that reportorial privilege jurisprudence deviates entirely from the majority approach in *Branzburg* lends authority to courts addressing breach of contract of confidentiality issues to narrowly apply the *Cohen* opinion.

Current reportorial privilege cases, considered in conjunction with the *Cohen* decision, reveal an unjustifiable irony. The judiciary can abrogate confidentiality agreements, but, according to *Cohen*, a news organization is absolutely liable when, in the fulfillment of its constitutional function of disseminating truthful information, it breaches a promise of confidentiality.<sup>208</sup> A strict application of *Cohen*, which fails to undertake any balancing analysis, thus goes beyond legitimate enforcement of the laws and intrudes upon the institutional autonomy of the press.<sup>209</sup>

Opponents of a media friendly balancing standard, nevertheless, assert that such standards would give the press too much discretion in deciding when to reveal a source's identity. If a journalist is asked to reveal a source during a grand jury investigation or other proceeding, the newsperson can invoke a reportorial privilege. Similarly, if a newspaper names a source and breaches a confidentiality agreement, the newspaper can claim a First Amendment right which immunizes it from liability. However, the prospect that media entities will be completely free to conceal or name sources at will is suspect. Judicially manageable standards, like the reportorial privilege, that consider and attempt to reconcile the conflicting interests curtail the media's ability to reveal or protect sources. Furthermore, even if news

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208. See Dicke, *supra* note 2, at 1586.

209. See *id.* at 1586 n.187.

organizations had an unfettered discretion to conceal or disclose their sources, there is no explanation as to why this would constitute a constitutionally unsound state of affairs.<sup>210</sup>

#### IV. TOWARDS A WORKABLE STANDARD IN CONFIDENTIAL SOURCE/BREACH OF CONTRACT CASES

Precedential authority in defamation law and reportorial privilege jurisprudence establish that contextual balancing standards are the only means by which to properly reconcile the conflicting values of contract doctrine and First Amendment principles in the breach of contract of confidentiality area. Courts should recognize that promises not to disclose a source's identity have a substantial impact on the exercise of free press rights because these agreements directly hinder the dissemination of truthful information. While states clearly have an important interest in enforcing valid contracts, the notion of an absolute right to contract has been discredited and speech-restrictive agreements should not invariably override First Amendment concerns. Judicial developments in related First Amendment cases implicitly recognize this principle.<sup>211</sup> Once it is accepted that a balancing analysis is best suited to resolve source contract cases, the question then becomes what factors should courts consider in the balancing scheme.

This Note proposes five elements of primary concern in the confidential source/breach of contract setting: (1) the substance of the information conveyed by the source to the reporter; (2) the nature of the communication; (3) the effect of disclosing the source's identity on the media's aim of keeping the public abreast of newsworthy items and thus promoting political, social and economic discourse; (4) the source's underlying motivation for requesting confidentiality; and (5) the reasons proffered by media defendants for breaching the confidentiality agreement. Although this standard cannot insure fair results in all cases because of the dynamic nature of reporter-source relationships and the inability to precisely discern the motives prompting sources to demand confidentiality, the standard does overcome the shortcomings of *Cohen* by compelling courts to assess the valid interests on both sides of the equation. Balancing competing interests is a settled function of the judiciary, and such balancing will guarantee more defensible outcomes than a formalistic application of

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210. Hirsch, *supra* note 104, at 208.

211. "A mere common law label—'contract' rather than 'libel'—does not make the Constitution disappear." POWE, *supra* note 55, at 189.

contract law ever could.<sup>212</sup>

Before any of the enumerated factors are considered, the aggrieved source should have to prove: (1) by clear and convincing evidence that a confidentiality agreement existed; (2) that the news organization breached the agreement by publishing the source's identity; and (3) that damages resulted from the breach. The more onerous standard of proof<sup>213</sup> will discourage disgruntled sources from bringing unfounded claims based on misunderstandings of vague agreements.<sup>214</sup> While this requirement will frustrate many source contract claims because confidentiality agreements are often oral with imprecise terms, this prerequisite is necessary to protect the press from prolonged and expensive litigation that would chill it from disclosing newsworthy information.<sup>215</sup> Nevertheless, in many source-reporter relationships, principally those involving public officials, this requirement will not pose an insurmountable obstacle to plaintiffs because promises of confidentiality are frequently well-defined and understood as the result of repetitive transactions between journalists and sources.<sup>216</sup>

#### A. *The Proposed Factors for Confidential Source/Breach of Contract Cases*

The first three factors examine the nature of the information conveyed by the source to the reporter. An inquiry into the substantive truth of the source's information, the type of information conveyed and the significance of the disclosure to the underlying story will enable courts to assess the First Amendment value to the public of the publication.

##### 1. SUBSTANCE OF THE INFORMATION

If a confidential source provides the newsperson with false infor-

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212. Justice Stewart, advocating a balancing of interest approach in reporter-grand jury cases, states: "No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all, is the function of courts of law." *Branzburg v. Hayes*, 408 U.S. 665, 745, 746 (1972) (Stewart, J., dissenting).

213. "Clear and convincing evidence" is an intermediate standard of proof, demanding more than a "preponderance of the evidence" but less evidence than "beyond a reasonable doubt." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 271 (1986) (Rehnquist, J., dissenting).

214. See Jens B. Koepke, *Reporter Privilege: Shield or Sword? Applying a Modified Breach of Contract Standard When a Newsperson "Burns" a Confidential Source*, 42 FED. COMM. L.J. 277, 310 (1990).

215. See Dicke, *supra* note 2, at 1576.

216. "The confidential interactions between journalist and public official have become so institutionalized that they now manifest the attributes of a business transaction." Langley & Levine, *supra* note 59, at 30.



mation, no justification exists for protecting that source's identity. Even a purely contractual analysis would fail to hold the media defendant liable for a subsequent breach of the confidentiality agreement.<sup>217</sup> News organizations usually will not print information provided by a source without first corroborating the facts of the story; therefore, reporters will likely discover the falsity of the information before publication. This does not, however, excuse the intentional distribution of erroneous facts to misinform public opinion, and bad faith sources should therefore be denied recovery for any breach of the promise of confidentiality that may follow.

This discussion presupposes that the confidential source knows that the information conveyed is false. Where the source acts in good faith but is misinformed or does not have access to all the relevant information, the claim should not be automatically dismissed. Where a source's knowledge and culpability are at issue, the source should bear the burden of refuting the presumption of bad faith. Although some good faith sources may be unable to refute this presumption, courts should not penalize the media defendant for breaching a confidentiality agreement based on false information. This is a harsh, but necessary result of protecting First Amendment values.<sup>218</sup> Furthermore, it will have the advantage of placing the onus on sources to ascertain that the information they provide is truthful and accurate.

In most situations, a source's information will be true in a narrow sense, but it will fail to disclose the entire story, thereby potentially misleading the public unless all the relevant facts are revealed. The source may be trying to purposefully distort public opinion, or he may be unaware that the facts are incomplete. Because of the difficulties inherent in determining a source's knowledge, courts must examine the other balancing factors in judging the appropriateness of the disclosure of the source's identity.

## 2. NATURE OF THE INFORMATION

This element focuses on the vitality of the source's information to the promotion of public debate and becomes central when considered in conjunction with the relevance of the source's identity to the story. If the value of the information imparted by the source is of minimal social concern, such as gossip or defamatory statements, news organi-

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217. "[N]either contract doctrine nor cultural norms about when to respect promises of confidentiality would support enforcement of such promises when the information provided by the source is false." Levi, *supra* note 46, at 717.

218. "[O]nce it is understood that exercising rights of expression hurts, the claim that any specific type of expression causes harm should be seen as a given, rather than as a reason to curtail the exercise of First Amendment rights." POWE, *supra* note 55, at 104.

zations are less justified in breaching confidentiality agreements.<sup>219</sup> If the information relates to a matter of significant public interest, however, such as stories concerning government affairs or the conduct of elected officials, courts should hesitate in second-guessing an editorial decision to disclose a source's name. Although consideration of this factor will require courts to make value judgments about news items, this analysis is consistent with the approach taken in other cases involving First Amendment issues, where the level of constitutional protection depends on the nature of the speech.<sup>220</sup>

### 3. THE RELEVANCE OF THE SOURCE'S IDENTITY TO THE PROMOTION OF PUBLIC DISCOURSE

An inquiry into the relevance of the source's identity and the effect of disclosure on the public's perception of the story's credibility is useful in determining whether the disclosure enabled the media entity to further the constitutionally protected goal of promoting political, social and economic discourse. The revelation of a source's name may affect public opinion about the story. In many cases, the source's identity and connection to the story will acquire a separable newsworthy value of greater significance than the underlying facts. This is especially true if the source is a well-known public official or figure and, in fact, courts may find it helpful to borrow from defamation methodology and make distinctions based on the public or private status of the source.<sup>221</sup> If the source is a public official or figure, the court should excuse the breach of the confidentiality agreement because the source's identity would alter the public's perception of the credibility of the information. Conversely, if the source is a non-public individual, there is less justification for the breach because the disclosure adds nothing to public discourse. Because the issue of the relevance of the source's identity will arise after disclosure has occurred, courts will be able to make concrete assessments about the relevance of the disclosure to a story based on the public's reaction to the source's identity. Judicial consideration of this factor will encourage the distribution of relevant newsworthy information while

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219. "If the information concerns a trivial matter, then the identity of the source is unimportant to the public." Koepke, *supra* note 214, at 312.

220. See *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 66-70 (1976) (stating that courts must make content distinctions in deciding First Amendment cases).

221. Some commentators advance standards that differentiate public official sources from private individual sources. Private individual sources are generally accorded greater protection under these standards than are public official sources when media defendants breach their promises of confidentiality. See, e.g., Hirsch, *supra* note 104, at 203.

preventing the media from arbitrarily disclosing confidential sources unless such disclosure enhances public discourse.

#### 4. THE SOURCE'S MOTIVE TO REQUEST CONFIDENTIALITY

Although a source's motives in requesting confidentiality may not be apparent to the journalist, the particular transactional facts may hint of the underlying motivation. Occasionally, a source's status in an institutional hierarchy will clearly show that the source is whistleblowing and seeks anonymity to avoid the loss of her job. In other situations, where the exposed information would have negligible impact on the source's position, the request for confidentiality indicates that the source fits either an ego, goodwill or record correction leak category.<sup>222</sup> Still, under other circumstances, information that discredits an official is generally leaked by a government informer who seeks to undermine that official's support.

An attempt to characterize a confidential source's motives in maintaining anonymity reveals the balance of power in the particular reporter-source relationship. Newsmen frequently do not share equal bargaining positions with sources and this may imperil First Amendment values because any imbalance will affect the information ultimately disseminated to the public. News organizations are vulnerable to public officials who attempt to manipulate the press and disempower the public by conveying planted information when only they have access to all of the information relevant to a particular news item.<sup>223</sup> Conversely, a journalist may obtain information from an inexperienced source in return for a promise of confidentiality the journalist never intends to keep. A balancing standard that acknowledges the potential imbalances of power in different reporter-source relationships may aid courts in equalizing the parties' bargaining positions consistent with First Amendment goals of fully informing the public.

Although a characterization of the source's motives for demanding confidentiality will give the court an understanding of the context of the reporter-source transaction, this factor alone cannot conclusively establish the propriety of the breach of the contract of confidentiality. This is because "there is no consensus that, at the abstract level, any of these categories of reasons for leaking should be disap-

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222. See *supra* notes 84-90 and accompanying text.

223. "The government's control of access to information and its centralized, aggressive publicity efforts made it both necessary and convenient for the press to rely on official sources in its reporting of news, particularly with respect to the executive branch." Levi, *supra* note 46, at 679.

proved per se.”<sup>224</sup> Furthermore, a court cannot always discern a source’s true motivations with sufficient clarity. Courts should thus consider the other suggested factors before holding that a media defendant’s disclosure of a source deserves constitutional protection.

#### 5. THE REASONS OFFERED BY MEDIA DEFENDANTS TO JUSTIFY THE DISCLOSURE

Consideration of this factor will allow courts to ascertain the degree of constitutional protection to grant a particular breach of confidentiality. Of course, this factor cannot be considered independently of the other factors because there may be multiple reasons for any given breach, and not all of them will be valid.<sup>225</sup> Nevertheless, some useful guidelines may be established. If the source is disclosed as the result of a request from a grand jury or other body empowered to issue subpoenas, the news organization should not be penalized for the breach. Similarly, if a media entity breaches a confidentiality agreement in order to safeguard its economic self-interest, as is the case in libel actions, the defendant should not be held accountable because the breach is not the result of any wrongful conduct by the news organization. Although such disclosures may not appear to directly further First Amendment values, immunity is required to safeguard the media’s status as an institution of the public, committed to the ideal of preserving the public’s “right to know.” A court should also hold a confidentiality breach permissible when the source’s identity independently becomes a subject of public concern, such as when the information provided is a plant, misleading, false or incomplete. In this case, the disclosure justifiably promotes public discourse and vindicates the editorial decision to breach the agreement.

#### B. *Possible Criticisms of the Proposed Standard*

The proposed standard provides protection to the press from the chilling effects of litigation over breaches of contracts of confidentiality. By rejecting the purely contract-based analysis adopted by the *Cohen* majority, this standard prevents unconstitutional judicial incursions into the editorial decision-making process. Some critics may, however, suggest that this approach inhibits press freedoms because, by giving media defendants protection against source contract suits, sources will be less willing to speak to journalists. Evidence indicates a lack of support for this contention. Under the

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224. *Id.* at 720.

225. See *supra* notes 95-99 and accompanying text.

present system, courts can, in limited circumstances, compel the press to disclose confidential sources, yet this does not deter sources from communicating with newsmen.<sup>226</sup> Furthermore, news organizations already face strong institutional pressures which discourage press entities from disclosing sources, thereby insuring that many promises of confidentiality will be upheld. In the long run, giving sources absolute protection for their breach of contract claims against reporters cripples the exercise of First Amendment rights because it may lead "not to greater willingness to confide in reporters, but rather to an atmosphere in which reporters will be extremely reluctant to establish confidential relationships."<sup>227</sup>

Another concern about adopting a media friendly standard in breach of contract of confidentiality cases is the apparent inability to reconcile press arguments in favor of a right to breach with the reporter privilege cases where media defendants assert the right not to disclose confidential sources in order to protect news gathering.<sup>228</sup> This lack of consistency does not, however, justify frustrating the First Amendment principle that the government, through the judiciary, cannot regulate the news. Although this critique points to a conflict between the publication and news gathering roles of the press, it fails to explain why contract law, unlike defamation, should claim a talismanic immunity from constitutional proscriptions.

## V. CONCLUSION

The majority opinion in *Cohen* deceptively eschews any meaningful inquiry into the competing values at stake. Instead, the Court chose to blindly follow the rhetoric of the "law of general applicability" cases. A fact-specific, contextual analysis indicates that the *Tribune* and the *Dispatch* would have prevailed. Although the information Cohen provided the reporters was true, the noticeable omission that the charges against Johnson had been vacated should have alerted the Court to the possibility of an attempted political smear campaign. The fact that Cohen conveyed politically charged information of the sort traditionally accorded the greatest constitutional protection and that the editors debated over the decision to reveal Cohen's name and his connections to the IR party and Wheelock Whitney should have led the Court to conclude in favor of the newspapers. Anything less than a complete disclosure of Cohen's

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226. See Dicke, *supra* note 2, at 1586.

227. Langley & Levine, *supra* note 64, at 24.

228. "'It's not easy to say we can't reveal a confidential source in one case but can in another.'" *Id.* (quoting Floyd Abrams, a prominent First Amendment lawyer).

identity would have been insufficient to keep Minnesota voters fully informed. It is likely that knowledge of Cohen's underhanded techniques could be imputed to Whitney and this, in turn, would reflect on his ethical fitness for office. It is also possible that Cohen, Flakne and other low-ranking campaign employees acted in isolation and that, as Whitney later alleged, he was unaware of this wrongdoing. Minnesota voters were, however, entitled to make this choice. By upholding the breach of contract action against the *Tribune* and the *Dispatch*, the Court implicitly held that this information was not within the relevant universe of information that voters should consider.<sup>229</sup> Such an outcome is an untenable intrusion by the Court upon First Amendment values.

OLGA C. PUERTO

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229. [T]he fact of Cohen's identity expanded the universe of information relevant to the choice faced by Minnesota voters in that State's 1982 gubernatorial election . . . . The propriety of his leak to [the press] could be taken to reflect on his character, which in turn could be taken to reflect on the character of the candidate who had retained him as an adviser. An election could turn on just such a factor; if it should.

Cohen v. Cowles, 111 S. Ct. 2513 (1991) (Souter, J., dissenting) (citations omitted).